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### ETHICS ADVISORY OPINION NO. 19-052-E

December 6, 2019

**Question Presented:** May a newly elected county supervisor maintain a real property lease approved by the board of supervisors before he took office when the board will not be required to take any further action on the lease?

**Brief Answer:** Yes, but any future action by the board to re-authorize the lease would render the lease null and void and would violate Section 109, Miss. Const. of 1890, and Section 25-4-105(2), Miss. Code of 1972. Additionally, the supervisor must fully recuse himself from any other action by the board which would affect the lease or the tenant, as required in Section 25-4-105(1).

The Mississippi Ethics Commission issued this opinion on the date shown above in accordance with Section 25-4-17(i), Mississippi Code of 1972, as reflected upon its minutes of even date. The Commission is empowered to interpret and opine only upon Article IV, Section 109, Mississippi Constitution of 1890, and Article 3, Chapter 4, Title 25, Mississippi Code of 1972. This opinion does not interpret or offer protection from liability for any other laws, rules or regulations. The Commission based this opinion solely on the facts and circumstances provided by the requestor as restated herein. The protection from liability provided under Section 25-4-17(i) is limited to the individual who requested this opinion and to the accuracy and completeness of these facts.

#### I. LAW

The pertinent Ethics in Government Laws to be considered here are as follows:

Section 109, Miss. Const. of 1890.

No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city, or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.

Section 25-4-103, Miss. Code of 1972.

(c) “Business” means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, holding company, self-employed individual, joint stock company, receivership, trust or other legal entity or undertaking organized for economic gain, a nonprofit corporation or other such entity, association or organization receiving public funds.

(d) “Business with which he is associated” means any business of which a public servant or his relative is an officer, director, owner, partner, employee or is a holder of more than ten percent (10%) of the fair market value or from which he or his relative derives more than Two Thousand Five Hundred Dollars (\$2,500.00) in annual income or over which such public servant or his relative exercises control.

(f) “Contract” means:

(i) Any agreement to which the government is a party; or

(ii) Any agreement on behalf of the government which involves the payment of public funds.

(g) “Government” means the state and all political entities thereof, both collectively and separately, including but not limited to:

(i) Counties;

(ii) Municipalities;

(iii) All school districts;

(iv) All courts; and

(v) Any department, agency, board, commission, institution, instrumentality, or legislative or administrative body of the state, counties or municipalities created by statute, ordinance or executive order including all units that expend public funds.

(h) “Governmental entity” means the state, a county, a municipality or any other separate political subdivision authorized by law to exercise a part of the sovereign power of the state.

(k) “Material financial interest” means a personal and pecuniary interest, direct or indirect, accruing to a public servant or spouse, either individually or in combination with each other. Notwithstanding the foregoing, the following shall not be deemed to be a material financial interest with respect to a business with which a public servant may be associated:

(i) Ownership of any interest of less than ten percent (10%) in a business where the aggregate annual net income to the public servant therefrom is less than One Thousand Dollars (\$1,000.00);

(ii) Ownership of any interest of less than two percent (2%) in a business where the aggregate annual net income to the public servant therefrom is less than Five Thousand Dollars (\$5,000.00);

(iii) The income as an employee of a relative if neither the public servant or relative is an officer, director or partner in the business and any ownership interest would not be deemed material pursuant to subparagraph (i) or (ii) herein; or

(iv) The income of the spouse of a public servant when such spouse is a contractor, subcontractor or vendor with the governmental entity that employs the public servant and the public servant exercises no control, direct or indirect, over the contract between the spouse and such governmental entity.

(l) “Pecuniary benefit” means benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain. Expenses associated with social occasions afforded public servants shall not be deemed a pecuniary benefit.

(p) “Public servant” means:

(i) Any elected or appointed official of the government;

(ii) Any officer, director, commissioner, supervisor, chief, head, agent or employee of the government or any agency thereof, or of any public entity created by or under the laws of the state of Mississippi or created by an agency or governmental entity thereof, any of which is funded by public funds or which expends, authorizes or recommends the use of public funds; or

(iii) Any individual who receives a salary, per diem or expenses paid in whole or in part out of funds authorized to be expended by the government.

Section 25-4-105, Miss. Code of 1972.

(1) No public servant shall use his official position to obtain, or attempt to obtain, pecuniary benefit for himself other than that compensation provided for by law, or to obtain, or attempt to obtain, pecuniary benefit for any relative or any business with which he is associated.

(2) No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member.

(3) No public servant shall:

(a) Be a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent, other than in his contract of employment, or have a material financial interest in any business which is a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent.

## II. FACTS

Facts provided by the requestor are set forth below, with identifying information redacted, and are considered a part of this opinion.

On November 4th, 2019, the County Port Commission entered into the attached Lease with [the named] LLC. The County Board of Supervisors approved the Port's action in executing the Lease. Both Board's decisions were unanimous and took place before [the sole owner of the LLC] was elected [to the board of supervisors] on November 5, 2019.

I have attached a copy of the lease. Please advise if [the person], who was elected on November 5, 2019, and the sole member of [the tenant] LLC can remain in the lease with the Port after January 1, 2020, which is the date he will first assume his duties as [a] County Supervisor.

The lease provides the option to renew in four renewal periods at set payments in the “sole discretion” of the lessee/tenant and will not require any further action by the board of supervisors if renewed under those terms.

## III. ANALYSIS

Section 109, Miss. Const. of 1890, and its statutory parallel, Section 25-4-105(2), Miss. Code of 1972, prohibit a member of a public board from having any direct or indirect interest in a contract which is funded or otherwise authorized by that board during his or her term or for one year thereafter. Frazier v. State, ex rel. Pittman, 504 So.2d 675, 693 (Miss. 1987). A lease is a contract for purposes of Section 109 and Section 25-4-105(2). A contract which violates Section

109 and Section 25-4-105(2) is null and void. Smith v. Dorsey, 530 So.2d 5, 9 (Miss. 1988); Waller v. Moore ex rel. Quitman County Sch. Dist., 604 So.2d 265, 266 (Miss. 1992); Towner v. Moore ex rel. Quitman County School Dist., 604 So.2d 1093, 109 1096 (Miss. 1992).

The supervisor-elect has a direct interest in the lease between his company and the county, but the lease was approved by the board of supervisors before the supervisor-elect will take office. Therefore, no violation will result from the initial approval of the lease. However, if the board of supervisors takes any action which has the effect of re-authorizing the lease after the supervisor-elect takes office, then a violation of Section 109 and Section 25-4-105(2) will occur. If a potential violation of Section 109 and Section 25-4-105(2) arises, the supervisor's resignation from the board will not prevent a violation of Section 109 and Section 25-4-105(2) unless the resignation occurs one year before the action by the board.

If the board of supervisors is not required to take any action concerning the lease during the board member's term or for one year after he leaves office, then no violation of Section 109 or Section 25-4-105(2) should occur. The lease provides that the tenant has the sole option to renew the lease, and the board of supervisors has no authority to approve or otherwise authorize an extension. Consequently, no violation of Section 109 or Section 25-4-105(2) will occur if the candidate exercises the option to extend the lease without any action by the board of supervisors.

Nevertheless, Section 25-4-105(1) prohibits a public servant such as a county supervisor from using his or her official position to obtain a monetary benefit for himself or a "business with which he is associated." The LLC/tenant is a "business with which [the supervisor-elect] is associated." See definitions in Section 25-4-103(d). To avoid a violation of Section 25-4-105(1), the supervisor-elect must totally and completely recuse himself or herself from any matter coming before the board of supervisors which involves the lease or the LLC tenant.

The potential for such a violation exists under the terms of the lease. Examples include, but are not limited to, the possibility of making future improvements to the property and the provisions related to insurance. The tenant is required to obtain various types of insurance related to the leased property. Disputes could arise between the board of supervisors, as the owner/lessor, and the supervisor-elect, who is sole owner of the tenant/lessee. Those disputes could even result in litigation pitting the board of supervisors against one of its members. Any such eventuality would constitute an untenable conflict of interest which could force the tenant/lessee to acquiesce to the board's demands or withdraw from the lease in order to comply with the Ethics in Government Law. If even a minor dispute arises, the tenant/lessee would be obligated, at a minimum, to recuse himself from any discussion or other action of the matter by the board of supervisors. A recusal will *not* prevent or ameliorate a violation of Section 109 and Section 25-4-105(2), as they do *not* require any affirmative act by an individual member but merely action by the board. Waller at 266.

A total and complete recusal requires that the county supervisor not only avoid debating, discussing or taking action on the subject matter during official meetings or deliberations, but also avoid discussing the subject matter with other supervisors or county officials. This restriction includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. An abstention is considered a vote with the majority and is not

a recusal. Furthermore, the minutes of any meeting should state the recusing supervisor left the room before the matter came before the board and did not return until after the vote.

Public servants of the county are also prohibited from serving as a contractor, subcontractor, or vendor to the county and from having a material financial interest in a business which serves as a contractor, subcontractor, or vendor to the county. See Section 25-4-105(3)(a). “The term contractor is generally used in the strict sense of one who contracts to perform a service for another and not in the broad sense of one who is a party to a contract.” Moore, ex rel. City of Aberdeen v. Byars, 757 So.2d 243, 248 (¶ 15) (Miss. 2000). Based on the facts provided, the candidate’s company will not be serving as a contractor, subcontractor or vendor to the county, and no violation of Section 25-4-105(3)(a) should arise under the lease agreement.

MISSISSIPPI ETHICS COMMISSION

BY: \_\_\_\_\_  
Tom Hood, Executive Director and  
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